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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DAVID PULLMAN, Plaintiff and Appellant, v. JOHN KOCINSKI et al., Defendants and Respondents.	B202792 (Los Angeles County Super. Ct. No. BC 330093)

APPEAL from a judgment of the Superior Court of Los Angeles County. Edward A. Ferns, Judge. Affirmed in part and reversed in part and remanded.

Law Offices of Allen Hyman, Allen Hyman, Christine Cloverdale for Plaintiff and Appellant.

Huston & McEwen, Scott W. McEwen, Kenneth D. Huston for Defendants and Respondents John Kocinski and Beverly Hills Development & Construction, Inc.

David Pullman (Pullman) appeals judgment in favor of defendants John Kocinski (Kocinski) and Beverly Hills Development Construction, LLC on his complaint seeking a permanent injunction to prevent defendants from removing lateral and adjacent support to plaintiff's property, which shares a common boundary with defendants' property. Pullman contends that the trial court erred in refusing to grant him an injunction and award damages incidental to his requested equitable relief, and in refusing to permit him to amend his complaint. We affirm the trial court's denial of a permanent injunction, but reverse its denial of damages.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background.

On November 4, 2003, Pullman purchased for $2.2 million the residence at 9250 Robin Drive (Lot 101) in the hills above West Hollywood. The home has four bedrooms, three baths, and a pool. At the time, the lot next door at 9240 Robin Drive (Lot 102) was a "shell property" consisting of a house, trees and a pool. The two properties were separated by a six-foot brick wall, and there were large bushes along the property line. In late 2003 or early 2004, Pullman commissioned a survey of the property, and in April 2004, Pullman planted 20 ficus trees next to the wall on his property at a cost of approximately $10,000. He intended the trees to provide shade, privacy, and beautification, and planted them a foot and a half from the property line.

On August 31, 2004, Kocinski, a real estate developer, purchased the property at 9240 Robin Drive. He put a chain link fence and a green tarp around the property. Kocinski's plans called for the removal of the brick wall and the building of a new wall, and in March 2005, his crew began tearing down the brick wall.

In February 2005, Pullman saw that Kocinski was cutting down the trees on Kocinski's lot, and Pullman was awakened one Sunday morning by the sound of the pool being demolished on Kocinski's lot. Soon thereafter, Pullman came home from work one afternoon to find four men on his property – Kocinski, Kenneth Stepp (his construction supervisor), and two other men. Pullman contended that Kocinski demanded Pullman cut

down the ficus trees to allow Kocinski to put in a fence that would facilitate construction of the house he intended to build on Lot 102. Kocinski contended that he offered to remove the trees, plant them in containers, and replace them after construction was completed. The parties disputed whether the ficus trees, vegetation, and wall were located on Kocinski's or Pullman's lot.

After this initial meeting between Pullman and Kocinski, their relationship became acrimonious. On March 10, 2005, Pullman filed his complaint seeking to enjoin Kocinski from removing the plants and wall.[1] On April 11, 2005, the trial court denied any relief except to enjoin Kocinski from trespassing on Pullman's property. The court noted that Pullman was "unlikely to be able to prove" that the wall, with the exception of a small portion, was on his property, and therefore Pullman could not enjoin the removal of the remainder of the wall. Further, the court found that although Pullman could prohibit Kocinski from trespassing on his property, he could not obtain equitable relief for damage done to his trees because an adequate remedy at law was available. Kocinski failed to inform his construction supervisor, Stepp, of the injunction, until December 2005.

In early 2005, Kocinski drilled numerous holes on his property that were 20 to 25 feet deep and six feet wide for caissons. Kocinski and his employees claimed they conducted surveys using monument markers and string to establish the caissons did not encroach on Pullman's property, except in some minor areas.

In January 2006, at Kocinski's direction, Stepp took down the chain link fence and tarp, and excavated Kocinski's lot to the property line by bulldozing the trees Pullman had planted. The ficus trees fell over onto Pullman's property, and Kocinski asked Pullman to remove them.

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[1] The complaint also named as defendants Kocinski's corporation, Beverly Hills Development & Construction, LLC, and Mark Abrams. Abrams was never served, and has been dismissed from the action.

Kocinski built a new wall on what he claimed was the property line. He contended his employees used strings and surveyor's marks to determine its proper placement. Except for three or four places where the rock fractured, Kocinski contended the excavation was on his own property.

Pullman claimed his house was worth $3.5 to $4 million prior to Kocinski's actions, and that the lost trees caused it to lose $400,000 in value. It cost Pullman $5,000 to haul away the trees and for cleanup, and the cost to replace trees he estimated to be $33,560. Pullman filled in a trench left next to Kocinski's new wall at a cost of $30,000.

B. Procedural History.

The trial court set the trial for July 5, 2006. On March 15, 2006, Kocinski filed a first amended cross-complaint, seeking to enjoin Pullman's encroachment on his property. On May 31, 2006, Pullman sought to file a first amended and supplemental complaint to allege additional claims and to seek damages for removal of the trees. Kocinski objected that the motion was untimely, and the trial court denied the motion. On June 29, 2006, Pullman filed another action in the Superior Court, No. BC354690 (the 690 Action) against defendants for trespass, encroachment, violation of covenants, nuisance, and lack of lateral and adjacent support, and sought equitable relief and damages.

A bench trial commenced on July 6, 2007. The trial court stated that it would hear Pullman's equitable claims first, and depending upon its resolution of the issues in the complaint, it would conduct trial on the cross-complaint. At the conclusion of trial, although Pullman argued the court could award damages incidental to the equitable relief sought, the court found that because Kocinski had removed the wall, all that remained of Pullman's claim was a permanent injunction seeking to enjoin trespass. On that basis, the court found for defendants because an injunction lies only to prevent threatened injury and had no application to wrongs completed. Further, the court found the line of cases giving the court incidental jurisdiction to consider damages had been disapproved; and in any event, Pullman had a concurrently pending case (the 690 Action) for compensatory damages for conduct occurring since the filing of the complaint for injunctive relief.

On July 31, 2007, Kocinski dismissed his cross-complaint, and on September 7, 2007, the trial court entered judgment in favor of defendants.

DISCUSSION

Pullman contends the trial court erred in (1) refusing to permit him to amend his complaint or to file a compulsory cross-complaint, (2) limiting his relief to the equitable relief of injunction as prayed in his complaint, and (3) failing to grant injunctive relief. We conclude substantial evidence supports the trial court's denial of an injunction, but that the court erred in refusing to permit Pullman to amend his complaint and in refusing to award damages.

I. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO PERMIT PULLMAN TO FILE AN AMENDED/SUPPLEMENTAL COMPLAINT.

A. Factual Background.

On May 31, 2006, Pullman sought leave to file a first amended and supplemental complaint. Principally, Pullman sought to add two parties (Stepp and Robin Estates, LLC, five causes of action (trespass, declaratory relief, violation of reciprocal covenants, nuisance, and lack of adjacent and lateral support), and a claim for compensatory and punitive damages. Pullman argued that amendment was necessary because, subsequent to the March 10, 2005 filing of the complaint, Kocinski had transferred his property to a new entity, Robin Estates, LLC; defendants had removed the trees and other plants on Pullman's property; defendants had excavated and removed bedrock; their conduct created a nuisance; and Pullman had retained new counsel on April 27, 2006. Furthermore, Kocinski had filed his first amended cross-complaint on March 16, 2006, and discovery was ongoing; therefore, there was no prejudice to Kocinski in permitting amendment.

Kocinski opposed, contending that the proposed amendment was untimely because it was filed more than a year after the original complaint; Pullman knew of the additional facts shortly after the filing of the original complaint; the proposed amendment was too

close to trial; and Kocinski would be prejudiced because it would cause a six-month delay in the trial.

The trial court denied the motion.

B. Discussion.

Code of Civil Procedure section 473 provides that a court may "in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party." (§ 473, subd. (a)(1).) California courts repeatedly have recognized that "'[t]here is a policy of great liberality in permitting amendments to the pleadings at any stage of the proceedings.'" (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) California courts also have recognized the well-established policy to decide cases on their merits. (See, e.g., *Jensen v. Royal Pools* (1975) 48 Cal.App.3d 717, 720, and cases cited therein.)

Further, where the plaintiff has brought an action for an injunction, and a claim for incidental damages accrues while the action is pending, a supplemental complaint is proper. Code of Civil Procedure section 464 provides that a plaintiff "may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer." (§ 464, subd. (a); see, e.g., *Melvin v. E.B. & A.L. Stone Co.* (1908) 7 Cal.App. 324, 326 [original complaint sought injunction against blasting and excavating; supplement proper to allege damages for injury to house resulting from blasting]; *Taylor v. Marine Cooks & Stewards Assn.* (1953) 117 Cal.App.2d 556, 559 [original complaint sought injunction against interference with union membership; supplement proper to allege damages for wrongful expulsion].)

Although a motion to amend the pleadings is addressed to the trial court's discretion, "instances justifying the court's denial of leave to amend are rare." (*Armenta ex rel. City of Burbank v. Mueller Co.* (2006) 142 Cal.App.4th 636, 642.) Thus, where there is a delay in amendment, but no prejudice to the other party, it is error to refuse amendment. (*Rainer v. Community Memorial Hospital* (1971) 18 Cal.App.3d 240, 252-253.)

Here, the procedural history of the case discloses that on December 2, 2005, the parties held a case management conference at which trial was set for July 5, 2006; a final settlement conference was scheduled for June 28, 2006. Three months after the case management conference, on March 15, 2006, Kocinski filed his first amended cross-complaint, and on May 31, 2006, one month before the final settlement conference, Pullman filed his motion to amend. Discovery was ongoing at the time. These facts establish the proceedings were still in the trial preparation stage, and we do not find any prejudice to Kocinski from permitting an amendment and supplement to the complaint to allege newly discovered facts and to add defendants. Pullman did not delay unreasonably in seeking to add such parties and defendants: The trees were not removed from Pullman's property until January 2006, 10 months after the filing of the original complaint, one month after the setting of the trial date, and two months before the filing of Kocinski's cross-complaint. Discovery was ongoing, and it would not have been overly burdensome to continue the trial for a short time and to increase the scope of discovery to include Pullman's new damages claims and Kocinski's transfer of the property to a third party controlled by Kocinski.

Furthermore, had the trial court permitted Pullman's amended and supplemental complaint, the scope of the trial would have accurately reflected the facts underlying the parties' dispute, allowed the court to adjudicate all issues between the parties, obviated Pullman's filing of the 690 Action, and omitted the difficulty the court found itself confronted with when it permitted Pullman to put on evidence of damages, but then refused to award them based upon the scope of the pleadings. "The office of a supplemental complaint is to bring to the notice of the court and the opposite party things which occurred after the commencement of the action, and which do or may affect the rights asserted and the relief asked in the action as originally instituted." (*California Farm & Fruit Co. v. Schiappa-Pietra* (1907) 151 Cal. 732, 743.)

II. DAMAGES MAY BE AWARDED BY A COURT SITTING IN EQUITY JURSIDICTION.

A court with equity jurisdiction has the power to award damages in an action seeking injunctive relief where such damages are incidental to the injunctive relief sought. (*Union Oil Co. v. Reconstruction Oil Co.* (1943) 58 Cal.App.2d 30, 33.) As explained in *Wolford v. Thomas* (1987) 190 Cal.App.3d 347, which addressed the right to a jury trial, where equitable claims necessarily implicate in their resolution legal claims for damages, the court may award damages. "It was infeasible for the court to sever the legal claim from the equitable one here. Moreover, the damage claims were incidental to the equitable claims. If the [plaintiffs] were to prevail and damages were awarded, it would be primarily on a basis of the court fashioning a remedy other than [an equitable remedy]. One of the aspects of an equitable action is the balancing of the interests of the parties. To do equity a trial court must have various options available to it, including that of awarding damages." (*Id.* at p. 354.)

Such relief is appropriate where damages occurred after the plaintiff has commenced a suit for injunctive relief. As noted in *Union Oil Co. of California v. Reconstruction Oil Co.* (1937) 20 Cal.App.2d 170, "The damage suffered by [plaintiff] occurred after the suit for injunctive relief had been filed and was a matter which grew out of the situation portrayed by the allegations of [plaintiff's] complaint. It was therefore purely incidental to the relief which [plaintiff] originally sought by its equitable action and a court of equity having properly acquired jurisdiction was justified in retaining it until all issues in the action should be determined. . . . (*Id*. at p. 183.) [T]he trial court was not without power to make an award of damages that were purely incidental to the equitable relief originally sought." (*Id.* at p. 184.) Thus, "it is a familiar principle of equitable procedure that equity having once acquired jurisdiction of the subject matter of an action will retain it to the end that a complete adjudication of all conflicting rights may be had and a final determination of all matters in controversy may be accomplished." (*Id.* at p. 183.) Finally, a court sitting in equity jurisdiction has the

power to award incidental damages without the necessity of a supplemental pleading. (*Ibid*.)

Here, Pullman's complaint originally sought injunctive relief to stop Kocinski from removing the retaining wall between the two properties, and sought to prevent Kocinski from trespassing and cutting down the ficus trees. Pullman obtained a preliminary injunction preventing trespass; Pullman's damages for Kocinski's disregard of the injunction and removal of the trees were entangled with his equitable claims. Once the trial court acquired jurisdiction over the equitable claim for trespass, even though it could no longer enjoin removal of the wall, it possessed the power and the obligation to award Pullman damages to resolve all claims between the parties. Further, such relief could have been awarded even in the absence of a supplemental or amended complaint.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT AN INJUNCTION.

Pullman argues the court erred in refusing to grant an injunction to enjoin Kocinski from committing further trespasses on his property due to the caissons that are partially on his property. We disagree.

"A permanent injunction is very different from a pendente lite injunction . . . . A permanent injunction is not issued to maintain the status quo but is a final judgment on the merits." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 646.) In issuing an injunction, a court in equity will consider the circumstances, the consequences of granting the injunction, and the equities of the case to determine whether an injunction will be granted. (*Thompson v. 10,000 RV Sales, Inc*. (2005) 130 Cal.App.4th 950, 964.) A permanent injunction must be supported by substantial evidence. We ordinarily review such factual findings under a substantial evidence standard and resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court's order. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390.) Further, the trial court may not issue an injunction where there is an adequate remedy at law. (*Tahoe Keys*

Property Owners' Assn. v. State Water Resources Control Bd. (1994) 23 Cal.App.4th 1459, 1471.)

The trial court's refusal to issue an injunction here is supported by substantial evidence. Although there was evidence at trial a small number of the caissons were on Pullman's property, the trial court in balancing the equities could have concluded removal of the completed caissons would be impractical; furthermore, there was no evidence damages would not adequately compensate Pullman for their presence on his property.

DISPOSITION

The judgment of the superior court is reversed with respect to Pullman's claim for damages, and the matter is remanded for a new trial. In all other respects, the judgment is affirmed, and the parties are to bear their own costs on appeal.

ZELON, J.

We concur:

WOODS, Acting P. J.

JACKSON, J.